UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

IN RE:	.	Case No. 18-27963 (MBK)
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DURO DYNE NATIONAL CORP, *et al.*	.	United States Courthouse 402 East State Street Trenton, NJ 08608
Debtors.	.	
	.	May 22, 2019
. . . . .	.	10:04 a.m.

TRANSCRIPT OF MOTIONS AND CONFIRMATION HEARING
BEFORE HONORABLE MICHAEL B. KAPLAN
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

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THE COURT: All right. Good morning. We have the Duro Dyne matters on for today which are the one, two, three, four motions to approve compromises and sales, as well as the confirmation hearings. I have a number of parties and counsel calling in on Court Solutions. I'm not going to have appearances made on the phone since this exercise for you -- it's mostly me speaking today and you all are on the listening end. But for the benefit of those who are on the phone, let me have appearances from the counsel who are here in court so that they know who's in court.

MR. PROL: Well, Your Honor, Jeffrey Prol and Terri Freedman from Lowenstein Sandler for the Debtors. Also in court with me are Cort Malone of the Anderson Kill firm, special insurance counsel for the Debtor, and the Debtor's CEO, Randy Hinden, and Abby Wein, who is in-house counsel.

Just so Your Honor knows, on the phone is my colleague, Jeff Kramer, who initiated the Court Solutions call for other members of the Hinden family and other officers of the company. As far as I know, on the phone with Jeff are Pat Rossetto, president; David Krupnick, who is the executive VP, and also a member of the Hinden family; Wendy Hinden; and Chris O'Callaghan, who is with the Getzler Henrich firm, financial advisors.

THE COURT: All right. Thank you.

MS. KOHUT: Good morning, Your Honor. Sara Beth

Kohut from Young Conaway for Lawrence Fitzpatrick, the future claimants' representative. And I understand that Mr. Fitzpatrick is on the phone.

THE COURT: All right. I also have Mr. Harron listed as well.

MR. CALHOUN: Good morning, Your Honor. George Calhoun of Ifrah, PLLC on behalf of the North River Insurance Company.

THE COURT: All right. Thank you.

MS. ROSS: Sommer Ross, Duane Morris, on behalf of MidStates Reinsurance Company.

THE COURT: All right.

MS. WILLIAMS: Abigail Williams of Shipman & Goodwin for Hartford Accident and Indemnity Company.

MR. McGRATH: Perfect timing. Good morning, Your Honor. William McGrath, Dilworth Paxson, on behalf of Munich Reinsurance America, Inc.

THE COURT: Okay. Great. Thank you very much.

It was my intent initially to --

(Pause)

THE COURT: Did they not hear any of that?

THE CLERK: I wasn't sure.

THE COURT: All right.

UNIDENTIFIED SPEAKER: Your Honor, I did not hear any of what he just said.

THE COURT: Okay.

UNIDENTIFIED SPEAKER: (indiscernible).

THE COURT: Is -- on the -- all right. Well, I had counsel in court enter appearances. We haven't progressed beyond that. I'm not going to have a repetition of it. For the most part, everybody you would think is here, is here than on Court Solutions.

It is my intent -- it was my intent this morning to read a very brief summary of my ruling. However, I saw how well that went over with -- for Attorney General Barr, and I thought reading summaries can -- short summaries can be problematic. I'm going to read a little bit more extensive summary of my ruling. It is not the proposed findings of fact and conclusions of law as you'll see, but it's a summary of my intent on ruling on the confirmation issues. So it is somewhat lengthy, please get yourself comfortable, then we'll have a discussion afterwards.

This matter comes before the Court upon the plan proponents' application for confirmation of the second amended plan. The background of this case including the nature of the Debtor's business and procedural history of this bankruptcy is well known to the parties and will not be repeated here. For purposes of this hearing it is enough to note for the record that the plan proponents have submitted the plan for confirmation and that the non-settling insurer, North River,

and the US Trustee's office have objected to confirmation on various grounds.

The Court has considered the submissions for the party, the proposed findings of fact and conclusions of law, as well as the arguments and evidence submitted at the confirmation hearing held on March 6 and 7 of 2019. We are also addressing of course the motions for -- seeking approval of the compromise with the settling insurers.

For the most part the Court is willing to recommend confirmation of the proposed plan. The Court finds that the plan is confirmed well over the objections of North River. However, the Court agrees with the United States Trustee that certain aspects of the plan including the TDP and certain trust documents are deficient, and as a result the Court is unwilling to recommend confirmation of the plan in its present form.

The Court will suggest remedial changes which, if accepted, would render the plan confirmable in this Court's opinion. Consistent with Federal Rule of Bankruptcy Procedure 3019(a), the proposed modifications would not adversely change the treatment of any claim or interest. The plan proponents will be given time to contemplate the suggested changes, and assuming these changes are accepted, and let me emphasize this is not a negotiation, this Court will recommend confirmation to the District Court. In the event the plan proponents do not accept the suggested changes, the Court will not recommend

confirmation.

Additionally, this hearing is not intended to be an exhaustive discussion of the issues related to confirmation. Following the plan proponents' acceptance or rejection of the suggested changes, the Court will issue formal and comprehensive findings of fact and conclusions of law along with his recommendation to the District Court.

For purposes of this hearing the Court will only touch on the most significant contested provisions of the proposed plan. Before moving on to specific statutory requirements of confirmation, the Court initially finds that the plan was filed in good faith and not merely as North River alleges as a means to gain leverage over insurers.

North River's correct in asserting that generally Chapter 11 is intended to reorganize financially troubled businesses, and that at the time they filed the instance bankruptcy the Debtors were solvent operating companies. However, 524(g) is somewhat of an exception to the general rule. And although the Debtors in this case are solvent companies, they face the uncertainty of future asbestos liability which includes not just the liabilities to asbestos personal injury victims, but potential contribution obligations to co-defendants and insurers for both indemnity and defense costs.

By its own admission North River asserts that the

Debtors face potential liability for its share of defense costs, which aggregate well north of $30 million, which means that the Debtors' potential total liability to all insurers is a contingent on a certain sum far in excess of that figure. Ironically and tragically this Debtors -- or these Debtors' very survival is threatened by the cost of its own defense attorney retained under its own insurance policies.

A bankruptcy filed pursuant to Section 524(g) removes that uncertainty and facilitates the company's ongoing liability, which in turn provides the trust with an evergreen source of funding to pay future claims. It defies logic to conclude that a bankruptcy under Section 524(g) should only be available to financially troubled businesses because Section 524(g) specifically contemplates a substantial ongoing business that can make the continuous payments to the trust.

This interpretation is discussed in various court opinions and scholarly articles and find support in the statutes and legislative history. In light of the structure and purpose of Section 534(g), such an injunction would be nonsensical to limit its use to companies on the brink of financial collapse when, in fact, the ideal candidate for a 524(g) injunction is a healthy business that is and remains a viable operation that can maximize the trust's assets to pay claims.

In this case the plan proponents set forth this plan

with the legitimate purpose of restructuring so they can emerge from bankruptcy able to operate as a going concern and continuously fund the trust. This benefits the Debtors as well as future claimant/creditors and comports with the objectives and goals of Section 524(g) of the Bankruptcy Code. Accordingly, the Court finds that the plan was filed in good faith.

North River also asserts that the plan violates the statutory requirements of good faith as a result of the Debtors' efforts to manipulate votes and classes. This argument is inextricably intertwined with North River's other objections which North River alleges -- in which North River alleges that the plan violates various Bankruptcy Code provisions. The mainstay of North River's arguments is that the plan misclassifies North River's future contribution claims for indemnity and defense costs in a class with all other asbestos personal injury claims. And also improperly discriminates against North River in its treatment of such claims in violation of 1122(a) and 1123(a)(3).

This Court finds that the classification and treatment of North River's claims under the plan is appropriate. As to classification, under 1122(a) of the Code a plan may place a claim or interest in a particular class only if such class -- only if such claim or interest is substantially similar to the other claims or interests in the

class. The Bankruptcy Code has broad discretion to decide if the plan satisfies that requirement and we will uphold a plan's classification scheme so long as it is reasonable and does not arbitrarily designate classes. And I'm citing of course the In Re W.R. Grace, a 3rd Circuit decision, 729 F.3d at 326.

In this case the Class 7 of the plan is entitled, Chattel, Asbestos Claims and includes in pertinent part any asbestos personal injury claim or indirect trust claim. The plan proponents contend that both the asbestos personal injury claims and North River's claims for reimbursement of post-petition defense expenses and pre- and post-petition indemnity expenses belong in Class 7. North River argued -- North River argues that its reimbursement claims arise from their contractual relationship with the Debtors and are not substantially similar to the asbestos personal injury claims, which are tort claims.

This Court is guided by the holding of W.R. Grace and determines that North River's claims are properly classified in Class 7 along with the personal injury tort claims. North River's arguments to the contrary are unavailing and overlook the purpose of Section 524(g) which evinces an intent to include all potential, and I stress all potential asbestos related liabilities of a Debtor regardless of when such liabilities arose.

As a practical matter, any claim that North River may

have against the Debtor arises from and is rooted in the same events as do all other claims and demands covered by the channeling injunction, namely the Debtors' production of asbestos containing materials. North River's claims arise indirectly from bodily or personal injury resulting from exposure to asbestos or asbestos containing products. This Court observes, as did the Bankruptcy Court in W.R. Grace, that both indirect and direct claims under the plan exhibit a similar effect on the bankruptcy estate. They seek recovery from the trust for actions related to the Debtors' asbestos liability.

It is unimportant whether North River's claims are for damages or defense costs or whether their claims are rooted in tort or contract law because the Debtors' liability for such claims depends solely on the asbestos related activities. The root element common to all Class 7 claims is asbestos. Therefore the plan reasonably classifies North River's claims in Class 7 together with the direct personal injury claims.

As to discrimination on Section -- under Section 1123(a)(4), that section requires that a plan of reorganization provide the same treatment for each claim or interest of a particular class. Indeed the Supreme Court has said that the quality of distribution among creditors is central policy of the Bankruptcy Code. That was Begier v IRS, 496 US 53.

Here North River objects to the confirmation alleging

non-compliance with this provision and discriminatory treatment of its claim. For the reasons which follow the Court overrules North River's objection and finds that the plan satisfies 1123(a)(4). North River asserts that its Class 7 claims fare far worse under the plan than other similarly situated creditors because its Class 7 claims are ineligible for any payment whatsoever.

However, North River's objection overlooks that the Bankruptcy Code's -- think I'm trying to go faster enough here -- that the Bankruptcy Code's equal treatment requirement does not mandate that the class members receive the same type of benefit. In this case a benefit in the form of monetary distributions, or even that all creditors in the class receive the same distribution percentage or payment at the same time intervals. Rather equal treatment has been interpreted to mean that all claimants in a class must have the same opportunity for recovery. And that, again, cites the In Re W.R. Grace.

Thus, the fact that North River is ineligible for a cash distribution while other Class 7 creditors are eligible is not dispositive of this issue. The focus for purposes of equal treatment under Section 1123 remains on whether North River has an equal opportunity to recover value on their claims and value comes in many different forms.

Here it is undisputed that the plan afford North River the opportunity to receive benefits in the form of trust

payment credits and judgment reduction credits. Although these benefits are a different type of benefit and have different value than other members of Class 7 which they might receive in that they are not cash payments, the trust payment credits and judgment reduction credits are an undeniable benefit and serve as legitimate compensatory value for North River's claims.

Thus, the plan does not unfairly limit North River's opportunity for recovery. It merely distinguishes the type of recovery available to North River. In fact, the depending on the factual circumstances, many other Chapter 7 claimants under the TDP will receive different types of compensation for their claims including varying payments amounts depending on the particular disease at issue, payment at different times or, in fact, no distributions at all. All in the discretion provided to the Trustees under the TDP adopted as part of the plan.

Indeed, as an example, claimants receive recovery for punitive damages, personal property injury, or less serious injuries will not be -- will be channeled to the trust as part of their plan treatment in Class 7, but may not see any monetary distributions. These procedural variations, and specifically the differences in the form of the value provided to creditors for their claims have a legitimate basis and do not produce a substantive difference in North River's opportunity to recover. Accordingly, the Court rejects North River's arguments regarding disparate treatment and finds that

the plan satisfies Section 1123(a)(4).

Further, this Court knows that in considering the quality of treatment among creditors, the 3rd Circuit instructs courts to consider the bankruptcy scheme as an integrated hole in order to evaluate whether the plan confirmation is warranted. That's In Re Combustion Engineering, 391 F.3d at 241. Courts are also in agreement that 1123(a)(4) does not require precise equality, only approximately equality. Again, W.R. Grace, 729 F.3d at 327.

As set forth above, North River is eligible to receive value for its claims in the form of trust payment credits and judgment reduction credits under the plan, and although they are not cash distributions, these credits have an undeniable value, and nothing of about the TDP unfairly restricts North River's ability to recover.

Apart from classification and improper discrimination objections under 1129(a), North River takes issue with its treatment of its Class 6 claim, specifically the application of the federal judgment rate post-confirmation. This Court agrees with North River's concerns. In determining the appropriate interest rate, this Court is guided by the Supreme Court's decision in Till v SCS Credit Corp, 541 US 465. In that case the Supreme Court observed that a debtor's promise of future payments is worth less than an immediate lump sum payment because the creditor cannot use the money right away.

Inflation may cause the dollar's value to decline before the debtor pays and there is a non-payment risk. Till at 466.

This Court is cognizant that Till dealt with cram down of the plan under Section -- cram down of a plan in a Chapter -- of a secured creditor's claim in a Chapter 13 bankruptcy. However, the underlying concepts are applicable in the present Chapter 11 case. Further, pursuant to Section 726(a)(5) the legal rate, which is the federal judgment rate, is for use only in liquidations under Chapter 7, and it is applied in Chapter 11 only for purposes of determining whether a plan satisfies the best interest of creditors test. It is used to determine what's fair to all creditors when they are sharing a limited pot of money.

That is not what we're talking about here. In this matter the Court is tasked with determining an interest rate that is sufficient to compensate North River for the present value of its claims. For the week ending on May 10, 2019, the federal judgment rate was 2.37 percent. This Court is not convinced that the federal judgment rate adequately compensates North River for the time value of its money and the risk of default. Rather, the Court calculates the appropriate rate using the Till formula by using the prime rate as provided for under the Till case which is presently 5.5 percent, and adding a 1 percent point to account for North River's risk of non-payment for a total rate of 6.5 percent.

Turning to the best interest of creditors test. The Court also overrules North River's objections based on 1129(a)(7). Section 1129(a)(7) requires that those in possession of a claim or interest in an impaired class receive or retain under the plan on account of such claim or interest property of the value as of the effective date of the plan but is not less than the amount such holder would receive or retain if the Debtor were liquidated under Chapter 7 of this title. This is commonly known as the best interest of creditors test, and in this case North River argues that the proposed plan fails this test because the plan does not propose to pay North River anything whereas North River could possibly receive a distribution in Chapter 7.

North River cites Mr. Podgainy's testimony in support of its argument. On direct examination Mr. Podgainy admitted that he could not testify as to whether the proposed plan satisfied 1129(a)(7). On cross-examination Mr. Podgainy further testified that North River might indeed receive a distribution in a Chapter 7 liquidation. Therefore North River posits that the possibility of a distribution in a Chapter 7 is more valuable than nothing and the plan cannot be confirmed.

As an additional matter North River's argument ignores the fact that it will receive full payment of its allowed Class 6 claims and that it will receive value for its Class 7 claims in the form of trust payments -- trust payment

credits and the judgment reduction credits. Again, North River improperly conflates payment with value. The Code does not entitle creditors to cash distributions, it merely requires that the creditors receive value for their claims.

Moreover, a firm liquidation analysis is an illusory proposition at this juncture. North River's asserted claims could not have been calculated by Mr. Podgainy because they are disputed and unliquidated and the coverage loss that remains pending in New York state. Even assuming that North River is successful in the coverage action, the extent and the amount of North River's Chapter 7 claims would depend in large part on North River's defense and indemnity costs and thus, again, are too variable to calculate.

North River also asked this Court to consider creditors' rights against third parties, specifically North River contends that the plan enjoins it from receiving the full value of third party claims against non-debtors, whereas it would retain those rights in a Chapter 7 proceeding. North River cites to In Re Quigley Company, which is a New York Bankruptcy Court decision out of the Southern District of New York in 2010 in which the Court found that a plan failed to the best interest of creditors test because dissenting claimants would not receive the full value of their third party claims against the debtor's parent company.

However, the Quigley case is factually

distinguishable from the case at hand. There, the objecting parties were asbestos claimants and not settling -- non-settling insurers that is in this case. In addition to the difference between the type of claim holder the values of the derivative claims at issue in Quigley were more easily estimated and predictable based on the historical payments made by the parent company. And as just discussed, the insurers' claims here are highly contingent and speculative. Even setting the factual differences aside, this Court knows that Quigley is an out-of-circuit decision and is not binding. This Court finds that the more persuasive case law limits the best interest analysis to the dividend that the creditor would receive from a Chapter 7 Trustee only and not from third party debtors.

The Court adopts the rationale employed by the plan proponents in setting forth the risks and costs associated with the Chapter 7 Trustee administering the various asbestos claims and settlements and the mounting administrative costs the Chapter 7 would face as undercutting any argument that there would be a meaningful dividend to North River in a Chapter 7. For the foregoing reasons, the Court determines the plan satisfies the best interest of creditors test articulated in 1129(a)(7).

The Court additionally finds over North River's objection that the plan complies with the requirements of

Section 524(g). And again, the Court will discuss only North River's most weighty arguments with respect to this provision. To be entitled to an injunction under 524(g) the trust must meet the structure and funding requirements of Section 524(g)(2)(B)(i). Section 524(g) requires that an asbestos settlement trust be funded in whole or in part by the securities of one or more debtors involved in such a plan and by the obligations of such debtor or debtors to make future payments including dividends. This is the portion of the statute that contemplates the evergreen source of funding for future asbestos claimants.

With respect to this section, North River argues that the plan proponents have failed to demonstrate that the trust is funded by securities of any sort. North River specifically emphasizes the trust will not be funded by future dividends as envisioned by the statute. However, Section 4.08(d) of the plan dictates that on the effective date the reorganized Debtor will issue and deliver the trust note to the trust. The trust note will be a promissory note in the original principal amount of 13.5 million payable in installments over roughly 20 years at an interest rate of 7.15 percent per annum.

Moreover, as the plan proponents point out, there's no mandatory requirement that dividends be used to fund the trust. Therefore the trust note constitutes an obligation to make future payments and satisfies Section 524(g)(2)(B)(i),

(ii).

Section 524(g) further requires that an asbestos settlement trust have the ability to own if specified contingencies occur in a major of the voting shares of said -- each such debtor. The parent corporation of each such debtor or subsidiary of each such debtor that is also a debtor. North River asserts that the plan violates this provision because no realistic possibility exists of the trust owning a majority of the voting shares.

Pursuant to the plan, the trust will receive a pledge of and possessory security interest in 50.1 percent of the reorganized Debtors' voting stock and 50.1 percent of the voting stock of Duro Dyne Canada. Under the pledge and security agreement which the reorganized Debtor will execute and deliver on the effective date, the trust will be entitled to own the pledged shares if an event of default occurs. North River asserts that the note default provision is insufficient and cites the Congoleum and the Plant Insulation case out of the 9th Circuit in support of this position.

However, this Court notes that since the decision in Congoleum at least one other case in the circuit, Burns and Roe, approved a plan which pledged to the trust 51 percent of the stock in the event of default. Moreover, North River's arguments require an assumption that the shares become worthless in the event of a default, or at least that the

shares value will drop to a negligible amount. This Court is not willing to make that leap and declines to conclude that a default on a trust payment means that the Debtor companies are insolvent or that their shares are worthless.

The Court must point out that North River previously argued that the Debtor companies were too healthy for a Chapter 11 bankruptcy at all, but now in the context of 524(g)(2) asks the Court to predetermine that the companies are so unstable that their stock can become worthless in the event of a default. These positions are untenable.

Further, this Court questions what benefit ownership of the stock in advance of a default would confer. As noted by the Courts in Congoleum and Plant Insulation, the purpose of this action is to ensure that the reorganized Debtors continue to operate for the benefit of asbestos claimants. If a Debtor is making payments on the note, then the trust is funded and everyone is happy. So even if the trust had ownership of the shares, it would not take any action with respect to those shares while payments are being made because the goal of Section 524(g) is being accomplished.

It is only until payments stop, when the reorganized Debtor is no longer operating for the benefit of the asbestos claimants. Thus a transfer of control upon default does not appear to impair the rights of the trust and future asbestos claimants or otherwise put them at a disadvantage.

I want to take this opportunity also to point out the distinction between the Congoleum case and the matter before the Court. In Congoleum the payment obligations consisted of a $121,000 semi-annual payment and the Congoleum case was not 100 percent dividend case. The Court viewed the payment obligations to be so insubstantial and nominal that if there were default and such, clearly there would be little value in the stock. Indeed the testimony during Congoleum that was alluded to in the decision referenced I believe the CEO who acknowledged that if Congoleum could not make a $121,000 payment semi-annually when due, then indeed the likelihood was that the stock was valueless and that the company was in dire straits.

That is not what we have here. We have substantially greater obligations than in Congoleum. We have a $13.5 million note over 20 years with interest at 7.15 percent which demands much greater than $121,000 in semi-annual payments. We have 100 percent distributions. Indeed, if a Debtor could not make a meaningless payment, yes, the stock could be considered worthless. But a default in payment obligations where there's such demanding obligations, does not necessarily mean that Duro Dyne is insolvent or that the stock is worthless. It's a completely different fact scenario which the Court in Congoleum recognized in distinguishing its own case from other cases.

Finally, the Court notes that the plan in this case

provides for a number of circumstances other than a payment default in which the trust could have the opportunity to exercise its rights to the voting stock. And for all these reasons the Court determines that the plan satisfies 524(g)(2).

Moving to -- moving on, 524(g)(2)(B)(ii) requires Courts to make certain factual findings to support the issuance of a 524(g) injunction. In this case the Debtors' history as defendants in the tort system, the nature of the asbestos litigation and the facts of these Chapter 11 cases support the findings required for the issuance of the asbestos permanent channeling injunction under Section 524(g).

Turning to adequate protection. North River also argues that the plan does not provide adequate protection of North River's alleged interest in the insurance policies that the settling asbestos insurers are buying back under Section 363 as part of the settlements with the Debtors. However, as the plan proponents point out, North River is not a lien creditor, instead it is an unsecured creditor to the extent of any allowed claim.

And courts uniformly hold that unsecured creditors are not eligible for adequate protection. North River simply does not hold any interest that is entitled to adequate protection under the Bankruptcy Code. Importantly, North River does not hold an interest in the insurance policies that the settling asbestos insurers will buy back under the settlements.

North River's contribution claims against the settling asbestos insurers, whether they are for indemnity or for defense costs, arises as a matter of equity. They do not involve property of the estate and does not erode the limits of those policies.

Moreover, the statutory basis for enjoining North River's contribution claims against the settling asbestos insurers in Section 524(g), not Section 363(f). North River's contribution claims against the settling asbestos insurers, which fall within the plans definition of asbestos insurance policy claims will be enjoined by the settling asbestos insurer injunction to be issued in accordance with Section 524(g) and supplemented by Section 105(a).

Under Section 524(g) a court may enjoin any action directed against an identifiable third party such as a settling insurer who is alleged to be indirectly liable for the conduct of claims against or demands on the Debtor to the extent of such alleged liability, and rises by reason of the third party's provision of insurance to the Debtor. In sum, North River's contribution claims against the settling asbestos insurers will be enjoined under 524(g) by the settling asbestos insurer injunction. The settling asbestos insurer injunction properly enjoins North River's contribution claims against the settling asbestos insurers because those claims fall within the -- within one of the by reason of categories set forth in 524(g)(4)(A)(ii) and are thus derivative of the Debtor's

asbestos liabilities.

North River's reliance on the Combustion Engineering and John Manville cases to support its discharge argument is misplaced. Those cases involve Section 105 injunctions that shielded non-debtors from their own independent asbestos liabilities, not the liabilities that were derivative of the Debtor's asbestos torts and enjoined under 524(g).

North River asks this Court to find in the alternative that if North River does not have an interest warranting adequate protection, then this Court lacks jurisdiction to enjoin North River's claims and contribution claims against the settling asbestos insurers. As previously discussed, North River's arguments presume that the plan proponents are seeking leave solely under 363 or 105 and therefore overlook that the settling asbestos insurer injunction is to be issued under Section 524(g).

Finally, the Court notes that without the Section 524(g) injunction, there would be no settling asbestos insurers, or their contribution towards the funding of the trust which serves the interest of the asbestos personal injury victims and is contrary to the underlying purposes of 524(g).

Bear with me one second.

(Pause)

THE COURT: Substantive consolidation. The plain proponents asked this Court to substantively consolidate and

merge all the Debtors into Duro Dyne National Corp, which will emerge as the reorganized Debtor if the request is granted. For the reasons discussed hereafter, the Court recommends substantive consolidation.

The US Trustee objects to this request and asserts that the plan proponents have failed to establish their case for substantive consolidation because Mr. Podgainy's testimony demonstrates his lack of personal knowledge regarding whether any creditor actually viewed the Debtors as a single entity. Furthermore, the US Trustee contends that the plan proponents were unable to cite a single example of a creditor negotiating an agreement with the Debtors as a whole.

In support of their request the plan proponents argue that the evidentiary record, specifically the certification provided by the Debtors' financial advisor, Mr. Podgainy, and the testimony given by Mr. Hinden, the Debtors' CEO, support a finding that the Debtors have satisfied the standard for substantive consolidation established by the 3rd Circuit in Owens Corning.

Although the Court agrees with the US Trustee that the proof presented by the plan proponents are lacking, as the plan proponents point out, the creditors in this case voted to accept the plan that provides for substantive consolidation of the Debtors' estates. Case law indicate that the test for consolidation articulated by the 3rd Circuit in Owens Corning

applies only absent consent.

The Court, especially in light of the fact that it's 100 percent plan, there is no prejudice to any creditor body of any of the independent Debtors, sees no reason to impede the plan proponents' efforts absent a more applied objection being raised. A Bankruptcy Court may order substantive consolidation of the Debtor's estates upon an evaluation of whether the economic prejudice of continued debtor separateness outweighs the economic prejudice of consolidation. In other words, a court must conduct an inquiry to ensure that the consolidation yields benefits offsetting the harm it inflicts on objecting parties.

No other creditors have joined the US Trustee in its objection, or asserted any prejudice or reliance on the credit worthiness of a single Debtor. Indeed, the US Trustee cites no harm that will befall any party in interest as a result of substantive consolidation. Additionally, the cost and time savings to be realized by the Debtors through substantive consolidation, however modest they may be, weigh in favor of consolidation. For the reasons discussed on this record, the parties are deemed to have consented to substantive consolidation and this Court determines that it is warranted.

Now the United States Trustee -- now we turn to the objections to the TDP procedures raised by the Office of the United States Trustee. First, the US Trustee objects to the

plan under Section 524(g)(2)(B)(ii) and argues that the plan proponents have not established reasonable assurance that the trust will be in a financial position to pay present claims and future demands that involve similar claims in substantially the same manner, specifically the US Trustee takes issue with the fact that the TDP does not provide any mechanisms for claw back of payments if initial payments are too high. And without the ability to take back payments, the US Trustee asserts that future claimants are left unprotected against fraudulent or invalid claims, and as a result may to be paid in substantially the same manner as earlier submitted claims.

This objection is being overruled. It's simply too costly, impractical and ineffective, and for the reasons set forth by the plan proponents. However, in its submissions and throughout the course of these proceedings, it has become evident to the Court that the US Trustee's primary objections to the plan is rooted in it concern that the TDP and the trust lack the safeguards to prevent fraud and abuse, and in some provisions it is argued that the TDP indeed facilitates such fraud and abuse.

The US Trustee's concerns are bottomed on alarms raised in industry studies and academic works. The US Trustee has not, however, been able to point to any concrete illustrations or identify actual harms which have manifested in the extended history of asbestos cases in our Bankruptcy

Courts. Apart of course from the Garlock case which this Court deems to be premised on a different factual scenario involving different concerns.

This does not mean that the concerns of the Office of the US Trustee are misplaced or that the Court and the US Trustee's oversight is not needed to ensure that the potential issues discussed do not materialize. That is why, in an effort to address the bulk of the US Trustee concerns relative to transparency, I am requiring certain changes to the TDP and the trust agreement. And now I'll turn to those specific concerns.

Initially the Court believes that the bulk of the concerns raised by the Office of the US Trustee can be addressed through the addition of language in the TDP which adds a notice requirement to the Office of the US Trustee, specifically I start with Section 2.3 of the TDP in which the Court requires that -- and throughout the whole document including the trust agreement, that whenever the TDP or the trust agreement requires notice to the futures representative or the TAC, or requires consent or actions, or provides information to the futures rep or attack, that the US Trustee for Region 3 be given notice.

So specifically I would add and I will identify the various sections that I think need to be modified, language that says, And on notice to the United States Trustee for Region 3 or his/her designee. I am not requiring the US

Trustee to give consent and I'm not requiring that the trust obtain the consent or that there be any actions by the US Trustee. I am simply requiring that whenever under the TDP or the trust agreement the futures rep or the TAC receive notices or information or are asked to consent to certain actions that the United States Trustee for Region 3 or his or her designee be given notice. The US Trustee could then decide how to respond, and I'll discuss that.

In my review of the TDP and the trust agreement, this requires changes, and you could all get a copy of the recording or a transcript of this ruling, and I'll read it out here, Section 2.3, 2.5, 3.1, 3.2, 4.2, 4.3, 5.3, specifically 5.3(a), 5.6, again, 5.6(a)(3), 5.7, 5.8, 5.11, 6.1, 6.5, 7.3, 7.8, 8.1 and 8.2. For the trust agreement -- that was all with the TDP -- for the trust agreement 2.1(c)(16), 2.1(f), 2.2(c)(i)(ii), 2.2(d), 2.2(e), (f) and (h), 3.3(c), 7.3, and 7.6.

Now notice is only as good as that which allows a party to act. So I'm requiring that under Section 7.13 of the trust agreement that the following language be added, this is with respect to the alternative dispute resolution process, That notwithstanding the foregoing, any issue or dispute raised by the Office of the US Trustee for Region 3 or his or her designee, which may arise under the trust agreement or the TDP may be brought directly before the Bankruptcy Court without

compliance with the dispute resolution procedure set forth in this section. So it's my dictate that the US Trustee be able to bring issues that it has as a result of the additional notice directly to the Court rather than pursuing dispute resolution.

While we're on the trust agreement I have one request if possible. There is a reference in Section 7.2 to Joseph P. Kennedy, Sr. for the rule against perpetuities. If we could find one of the more detestable people in our history in my view, so if we could just base the rule of perpetuities on somebody else's life, it would just make me happier, but it's not critical.

Turning to Section 6. -- I think I made the same request in State Insulation. Returning to the TDP, Section 6.3, which deals with the withdrawal and deferral of claims, the Court is directing that the first sentence be removed and that the paragraph be changed to simply address deferral of claims to eliminate the ability to withdraw claims without statute of limitation consequences. The Court views the administrative burden to be negligible to keep any claim on deferred status. The Court does not take issue with keeping claims on deferred status, but sees no reason why a claimant should be entitled to withdraw a claim and not have an impact on statute of limitations.

Turning to Section 6.5 of the TDP. The Court has had

an opportunity to read proposed Senate Bill S-766 which is called the Protect Asbestos Victims Act. I think it was introduced on March 13 of 2019. And it addresses the critical claims that the asbestos trust system lacks any independent oversight by a neutral third party to ensure that the trusts aren't deceived into paying erroneous or false claims and it also addresses the public interest in having the information on the claims and claims disposition available for review in limited situations.

Now the Court is cognizant that proposed legislation is not binding law, that there are reasons legislation do not pass. Congress sets it own agenda. I won't comment further. But notwithstanding -- well, let me first premise that the Court is cognizant that it does not have the authority or the legislative role in implementing a good portion of what's included in this bill as far as enforcement mechanisms. However, just because legislation is not passed doesn't -- or become law, isn't -- doesn't mean it's necessarily misguided and cannot offer some ideas and guidance.

And in this vein I look at Section 2.89 of this bill, S-766, and it reads, With respect to assessing trust information in general subject to Section 107 and any appropriate protective order, a trust described in Paragraph 2(b)(1) shall on written request provide in a timely manner any information relating to any payment from and any demand for

payment from the trust to a party to an action at law or equity if the action relates to liability for asbestos exposure. And then it goes on to say that the trust described in that paragraph may require from the person making the request payment of any reasonable cost incurred to comply with the requirements.

The Court believes that the intent underlying this provision can be accomplished with the following change to 16.5 -- I'm sorry, 6.5. And indeed I believe in the most recent marked versions the plan proponents did address the primary concern which would be to replace the phrase, Bankruptcy Court, a Delaware State Court, or the United States District Court for the District of Delaware with or ordered by a court with the phrase that says, Or ordered by a court of competent jurisdiction.

I believe the change may -- does go far to satisfy the concerns raised in the bill. So I wouldn't add to it except to provide a backstop, that in addition to a court of competent jurisdiction, we include the option to seek an application before the Bankruptcy Court. It is the intent of this Court that for the trust to respond to a court order or a subpoena issued by any court handling a suit in law or equity which relates to liability for asbestos exposure, or as a backstop after application to the Bankruptcy Court so that as a -- in addition to any subpoenas from a competent court or

court orders, anyone seeking information pertaining to the claims being made or paid can seek authorization from this Court to direct the trust to release that information.

That's it, folks. Those are the only changes that I am requiring. In effect, as a summary, if we go through it, it's changing the interest rate on the Class 6 claim, it is requiring the additional notice to the Office of the US Trustee whenever notice or consent is asked for or given to the futures rep or the TAC as I've outlined. It is removing the ability to withdraw claims and be shielded from the statute of limitations issues. It is allowing the US Trustee to seek the intervention of the Bankruptcy Court on any issue as opposed -- raised under the trust or the TDP as opposed to the dispute resolution process. It is ensuring that the Bankruptcy Court can be a forum in addition to any competent forum where parties seeking access to claims information can seek an order directing the trust to disclose that information. And I think that covers the issues, the primary issues.

There was one issue raised on -- as to the substantial consummation, when that will be effective. I think there should be clarity that substantial consummation of this plan will not occur prior to the effective date nor prior to any certification by or on behalf of the plan proponents confirming the all requirements under Section 1101.2 have been met that will inform all that the plan is ready to be deemed

substantially consummated.

So now the decision rests with the plan proponents whether or not they wish to proceed under these parameters. I am happy to give time to consider it. I'm thinking through June 3. I know it's a holiday weekend, but I'm certainly here. I'll also -- I'll entertain are there any questions. Well, let me first -- needless to say, I'm prepared also to approve the compromises which incorporate the sale of the policies. I find that they are integral to advancement of the plan and benefitting the estate and the funding of the trust, which will benefit the targeted asbestos personal injury victims who are to be protected under Section 524. I've addressed the adequate protection issues that were raised and objections that were raised.

So I'm ready -- I will, if the plan proponents agree to move forward under the parameters I set forth, issue proposed findings and conclusions of law to the District Court. I don't know the timing of the District Court, they're strapped these days. There will be ample time to file notices of appeal or motions for reconsideration, whatever objectors wish to pursue.

Is that -- is June 3 a reasonable amount of time? Do you --

MR. PROL: Your Honor, Jeff Prol for the record. I just wanted to thank Your Honor for obvious hard work in doing

this and the time you put in. I would like the opportunity to consult with my client as well as with the other plan proponents with regard to this, and I hope that (indiscernible) on the phone --

UNIDENTIFIED SPEAKER: Can he get closer to a mic? it's hard to hear him on the phone.

MR. PROL: The -- what may take the most amount of time here is for the ACC to go back to committee members and start to ask for them to weigh in on whether or not they think that (indiscernible) is appropriate timing.

I do have one question for Your Honor about the ruling. There are a number of provisions in here where the US Trustee is required to give notice to the trust and opportunity to come back to this Court. Given the length of time with which the trust has to operate just to retain the note, I would hope the order's not contemplating keeping this case open as we'd like to, once we get through confirmation and then we're in a position to close and would effectively like to close the case.

And I certainly don't think that closing the case would be restrictive if the Trustee had an issue or anybody wanted to come back here and get a subpoena to go (indiscernible). The could certainly seek to reopen the case as part of that process.

THE COURT: I have -- first of all, as the Office of

the US Trustee well understands, I do whatever I can to close my cases. I am happy to have them closed. I will always facilitate reopening the case and waiving fees, especially in light if it's Chapter 11 fees. To reopen a case the filing fee would be substantial. So I have no problem reopening a case at any time to address issues that arise. I don't think I need to keep this case open for the life of the trust.

MR. PROL: Thank you, Your Honor.

THE COURT: Once again, I want to --

MR. CALHOUN: Your Honor, you'll be shocked to know that we may disagree with some of your proposed conclusions. I really have more of an administrative request, or comment which is, to the extent that Your Honor -- assuming that the plan proponents agree to the changes Your Honor has mandated, when you issue your proposed findings I would request that you issue the settlement orders as proposed findings also so that they all go up together, because they're -- because the way you've ruled on the settlements, the 524(g) injunction is integral to the settlements, that would prevent us from having to file separate appeals as to the settlement orders, you know, put everything on the same track.

So I think for administrative reasons that's the easiest way to move forward with that, and I'd request that rather than issue separate settlement orders, that you tie them expressly to the proposed findings that go up to the District

Court.

THE COURT: It would seem to make sense. I would think that for -- if my -- let's say the District Court accepts my proposed findings, or doesn't, let's say they don't accept it. Then I assume there's not going to be settlements, that they're tied. In other words, if confirmation is not approved by the District Court, then the settlements will also go by the boards. So they need to be considered together, but I certainly will hear Mr. Prol or anyone else who will need to address it.

All right. Mr. Calhoun, you're suggesting I keep orders approving the settlement or include it in one order as part of the proposed findings and conclusions?

MR. CALHOUN: I don't know that that makes that big of a difference, Your Honor. If you do it as one, that's simple. They're certainly intertwined. I don't know if that's makes a difference but I just want them on the same schedule if that fits everyone's --

THE COURT: Okay. Mr. Prol?

MR. PROL: I'd like the opportunity to consult with --

THE COURT: Sure.

MR. PROL: -- the insurance counsel as well as with the plan proponents' insurance counsel before we weigh in on that. What I suggest is if we can come back, Your Honor, with

a yay or nay on the plan amendments perhaps you could address that procedure at that time.

THE COURT: To make it easier do you want to have just a conference call where you don't have to actually give me a yay or nay next week after the holiday, on the 29th or 30th, just to tell me if you need more time or you're -- or what your timing would be, and if there's any objection to Mr. Calhoun's administrative proposal.

MR. PROL: I think that that sounds like it makes a lot of sense, Your Honor. The holiday is this Monday, the 27th --

THE COURT: Right.

MR. PROL: -- were you thinking later that week or --

THE COURT: Yeah, I -- now on the 28th nobody needs to come back to this. We can go and do it on the 30th which is a Thursday.

MR. CALHOUN: No, that day doesn't work for me. The 31st would work.

THE COURT: Friday morning for a quick call, the 31st?

MR. PROL: (indiscernible).

THE COURT: Then why don't we plan that. We'll do a call at eleven o'clock Friday morning. And --

MR. WEHNER: Your Honor, this is Jim Wehner --

THE COURT: Yes.

MR. WEHNER: -- from Caplin & Drysdale for the Committee.

THE COURT: Yes.

MR. WEHNER: That Friday conference makes sense to me. I'm just sort of echoing Mr. Prol's sentiment that it may take us longer than being served to digest the changes that you have made and get to a decision on that. Not -- hopefully not much longer, but we can talk about that on the 31st.

THE COURT: It's understandable. It was lot for me to go through, it's a lot for you to digest. However, let's -- I just want to keep it on track so I know the timing and so that Mr. Calhoun and others, the US Trustee, have an idea of timing of when they have to act. So let's -- we'll discuss this then on the 31st.

All right. I guess why don't we do it through Court Solutions, make it easy so everybody can call in.

MR. PROL: Thank you, Your Honor.

THE COURT: All right. Thank you all. Have a good holiday.

MR. CALHOUN: You too, Your Honor.

UNIDENTIFIED SPEAKER: Thank you, Your Honor.

THE COURT: You're welcome.

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CERTIFICATION

I, TERRI STARKEY, a certified electronic transcriber, certify that the foregoing is a correct transcript, to the best of the transcriber's ability, from the official electronic sound recording of the partial proceedings in the above-entitled matter.

/s/ Terri Starkey

TERRI STARKEY

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